84-1582
NO.

Office - Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

R. S. MARTIN, JR., ET AL

Petitioners,

versus

KILGORE FIRST BANCORP, INC.

and

KILGORE FIRST NATIONAL BANK

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOL. I

CHARLES H. CLARK
P. O. Box 98
Tyler, Texas 75710
Telephone: 214/593-2514

Attorney for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

55

QUESTION PRESENTED

Are the provisions of 12 U.S.C. § 215(d) satisfied by the auction of stock in a bank holding company incorporated under the laws of the State of Texas or must stock in a national banking association be auctioned to properly comply with 12 U.S.C. § 215(d)?

LIST OF INTERESTED PARTIES

(1) R. S. Martin, Jr.
(2) Coca-Cola Bottling Co. (Biedenharn)
(3) James D. Ballinger
(4) Helen George Bolt
(5) Herbert Cashen
(6) Evelyn Cashen
(7) Herbert Cashen II
(8) Shack Cashen
(9) Gregory Cashen
(10) Mrs. Walter Chandler
(11) Alleyn Crim
(12) John T. Crim, Jr.
(13) L. N. Crim, Sr.
(14) L. N. Crim, Jr.
(15) Charles Duvall
(16) Crown Dickson
(17) D. L. Griffin
(18) Harold Hobenicht
(19) Louise Huffman
(20) Fulton Johnston
(21) James Dick Laird
(22) Mary F. Love
(23) E. B. Mobley
(24) Maxine L. Mobley
(25) Robert Mann c/o Omnibus Corporation
(26) Robert C. Overton
(27) Lois Laird Overton
(28) Robert Carter Overton III
(29) Nadine U. Parks
(30) Nell Laird Pederson
(31) Mrs. Camie Reich
(32) Maud Overton Stocker
(33) William Tennis
(34) Kilgore First National Bank
(35) Kilgore First Bancorp, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Statement of Jurisdiction	2
Statutes Construed	3
Statement of the Case	4
Reason for Granting Certiorari	7
Argument	8
Conclusion	22
Certificate of Service	24
Appendix A—Text of 12 U.S.C. § 215	A-1
Appendix B—Text of Fifth Circuit Opinion in *Martin v. Kilgore First Bancorp, Inc.*	A-6
Appendix C—Text of District Court Findings and Conclusions in *Martin v. Kilgore First Bancorp, Inc.*	A-17
Appendix D—Excerpts from Kilgore First Bancorp, Inc. Prospectus	Vol. II, A-27
Appendix E—Denial of Rehearing by United States Court of Appeals for the Fifth Circuit	Vol. II, A-111

TABLE OF AUTHORITIES

CASES: **PAGE**

Central-Penn National Bank v. Portner,
201 F.2d 607 (3d Cir. 1953) 21
Ellis v. State National Bank of Alabama,
434 F.2d 1024 (5th Cir. 1970) 13
Martin v. Kilgore First Bancorp, Inc.,
747 F.2d 1024 (5th Cir. 1984) 17, 18, 19, 21

STATUTES:

12 U.S.C. § 83 12
12 U.S.C. § 215 . . . . . 2, *et seq.*
12 U.S.C. § 215a 10, 12, 13
12 U.S.C. § 215b 13
12 U.S.C. § 1842 5
26 U.S.C. § 351 4
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 2101(c) 2
28 U.S.C. § 2201 2

RULES:

United States Supreme Court Rule 17.1(c) 8
United States Supreme Court Rule 20.4 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. S. MARTIN, JR., ET AL

Petitioners,

versus

KILGORE FIRST BANCORP, INC.

and

KILGORE FIRST NATIONAL BANK

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, R. S. MARTIN, JR., ET AL, Petitioners, pursuant to United States Supreme Court Rule 21 and hereby petitions for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINION BELOW

The official reference to the decision of the Court of

Appeals for the Fifth Circuit is *Martin v. Kilgore First Bancorp, Inc.*, 747 F.2d 1024 (5th Cir. 1984).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1984. Petitioners' Motion for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on January 7, 1985. This Petition for a Writ of Certiorari was filed within ninety days from the date rehearing was denied by the United States Court of Appeals for the Fifth Circuit and is, therefore, timely filed pursuant to 28 U.S.C. § 2101(c) and United States Supreme Court Rule 20.4. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES CONSTRUED

This case involves the proper construction of 12 U.S.C. § 215, specifically subsection (d), the full text of which is set forth verbatim beginning at Appendix A—A-1.

STATEMENT OF THE CASE

This is a Petition to the United States Supreme Court requesting issuance of a Writ of Certiorari to review a Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit. Said Judgment and Opinion affirmed the rulings made by the United States District Court for the Eastern District of Texas which, as the Court of first instance, properly exercised its jurisdiction over this matter by virtue and authority of 28 U.S.C. §§ 1331 and 2201. The pertinent facts underlying Petitioners' request for issuance of a Writ of Certiorari from this Honorable Court are set forth as follows:

Sometime in 1980 or 1981, the controlling shareholders (the Fender interests) of Kilgore First National Bank (First National I) proposed a plan of reorganization to its board of directors whereby the ownership of First National I would be converted from individual shareholder ownership to bank holding company ownership. This proposal was initially rejected by a majority of the board of directors because it was not considered to be in the best interests of all the shareholders of First National I.

Subsequently, the Fender interests succeeded in having several of the directors who had voted against the reorganization plan removed. With these new directors in place, the Fender interests were then able to secure approval of their reorganization plans from a majority of the board of First National I as it was now comprised.

Because of the substantial dissent expressed by many of First National I's shareholders, the Fender directors realized that a traditional voluntary tender offer would not be feasible. Instead, the change of ownership of First National I would have to be accomplished through the use of an acquisition vehicle known as a reverse triangular merger in order that shareholders dissenting from the reorganization could be effectively eliminated by the Fender interests. This type of merger has three steps: (1) the controlling shareholders of an existing bank establish a bank holding company; (2) these same controlling shareholders then apply to the appropriate authorities to charter an interim bank which is wholly owned by the holding company; and (3) the board of directors of the existing bank and the interim bank agree to merge or consolidate the two banks, subject to approval of the Comptroller of the Currency (Comptroller), thereby forming the

surviving bank. If the combination of the interim bank and the existing bank results in one of the banks continuing to exist while the other ceases to exist, the transaction is termed a merger. However, where both banks cease to exist and a new bank is formed, as is the case in these proceedings, the combination is referred to as a consolidation.

In contrast to the tender offer method of acquisition which is essentially voluntary, *i.e.*, bank shareholders have the option to reject or accept the tender offer of the holding company, merger or consolidation acquisitions are involuntary in the sense that if the requisite number of shareholders approve the merger or consolidation, all bank shareholders are compelled to either become shareholders of the holding company or to exercise their statutory rights of dissent which are enumerated at 12 U.S.C. § 215(d). Under this subsection, dissenting shareholders of an existing bank that has been consolidated are entitled to be paid the appraised value of the shares they formerly owned in the existing bank and they are further entitled to receive any excess over that value generated by an auction of the shares of the consolidated banking association which they would have received but for their dissent.

In order for the holding company to take advantage of the tax-free exchange provisions of Section 351 of the Internal Revenue Code, in the context of its acquisition of an existing bank, at least 80% of the outstanding stock of the bank sought to be acquired must be purchased. Because Petitioners, who owned over 20% of the outstanding stock of First National I, indicated that they would resist any attempt to convert the bank to holding company ownership, the exchange would have been fully taxable if the tender offer method had been used. However, the reverse triangular merger method allowed the Fender interests to totally

eliminate the substantial number of dissenting shareholders so that the Fender's holding company would then be able to acquire in excess of 80% of First National I's stock, thereby avoiding tax liability on the exchange. In fact, the reverse triangular merger concept allows the controlling shareholders of an existing bank to shut out a sizable number of dissenting shareholders in a relatively easy manner.

As soon as the controlling shareholders gain influence over a simple majority of the existing bank's board of directors, they can have these directors apply for approval of a holding company, charter the interim bank merger partner, and agree to the plan of consolidation and submit it to the shareholders for a vote. By having control over this simple majority of directors, the controlling shareholders can attain 100% of the existing bank's stock by mustering only a two-thirds vote in favor of the consolidation among the shareholders. It is easy to see why this type of merger is highly preferable to the tender offer method of acquisition which does not guarantee 100% ownership of the existing bank stock and also allows a minority contingent of at least 20% of the shareholders to effectively block the acquisition.

To implement the reverse triangular merger, the Fender interests' directors applied to the Federal Reserve Board for prior approval of the formation of a bank holding company as required by 12 U.S.C. § 1842(a). On July 20, 1981, the Fender directors formed a Texas corporation, Kilgore First Bancorp, Inc. (Bancorp) for the express purpose of acquiring and holding all the outstanding stock of the surviving bank. The Federal Reserve Bank of Dallas approved Bancorp's application to become a bank holding company on January 19, 1982. The Fender directors then

secured a charter for the interim bank, New Kilgore First State Bank (First State), from the Commissioner of the Texas Banking Department on May 18, 1982. As explained earlier, First State was formed to serve the interim function of a controlled subsidiary needed by Bancorp to execute the reverse triangular merger. Once these preliminaries were accomplished, a majority of the directors presented the Fender interests' plan of consolidation to the shareholders of First National I on September 30, 1982. The consolidation plan was presented to the shareholders in the form of a proxy statement accompanied by a prospectus on Bancorp. A special shareholders meeting was called for October 22, 1982 in order that a vote on the plan of consolidation could be taken.

Petitioners voted against the consolidation at the October 22 meeting, thereby becoming dissenting shareholders within the provisions of 12 U.S.C. § 215 (b)-(d) which governs the consolidation of national and state banks. Pursuant to section 215(d), the Comptroller, on March 16, 1983, gave notice of his intention to cause an appraisal of the shares of First National I held by Petitioners. These parties were later paid the appraised value of their First National I stock which was $279.69 per share. Bancorp subsequently scheduled a public auction of its stock in an attempt to comply with the second potential payment requirement of section 215(d).

Prior to the auction date, Petitioners filed suit against Bancorp and the surviving bank, Kilgore First National Bank (First National II), in the United States District Court for the Eastern District of Texas seeking, *inter alia*, a temporary restraining order and a preliminary injunction to stop the scheduled auction of Bancorp stock based on their contention that Section 215(d) required the auction of First National II stock and not Bancorp stock.

The district court granted the temporary restraining order against the auction on July 26, 1983. However, the district court later denied Petitioners' preliminary injunction and dissolved the temporary restraining order. The denial of the injunction was appealed by Petitioners to the United States Court of Appeals for the Fifth Circuit. (Fifth Circuit). Petitioners later moved for a partial summary judgment on their claim that Section 215(d) required the auction of First National II stock instead of Bancorp stock. The district court certified to the Fifth Circuit its subsequent denial of that motion. Petitioners filed an appeal based on that certification which was accepted by the Fifth Circuit. Petitioners' appeal of the denial of the preliminary injunction and their appeal of the denial of the partial summary judgment were later consolidated by the Fifth Circuit.

The Fifth Circuit handed down its decision on the consolidated appeals on December 7, 1984. The Fifth Circuit held that 12 U.S.C. § 215(d) would be satisfied by the auction of Bancorp stock. Petitioners timely filed a Motion for Rehearing of this decision which was denied by the Fifth Circuit on January 7, 1985. Petitioners now respectfully pray that this Honorable Court issue a Writ of Certiorari to review the December 7, 1984 Judgment and Opinion of the Fifth Circuit based upon the following authorities.

REASON FOR GRANTING CERTIORARI

In setting forth the following argument in support of issuance of a Writ of Certiorari, Petitioners are mindful that a review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. With

this in keeping, Petitioners will emphasize their belief that the Fifth Circuit's construction of the auction provisions of 12 U.S.C. § 215(d) has incorrectly decided an important question of federal law which has not been, but should be, corrected and settled by this Court. The following argument will amplify this important United States Supreme Court Rule 17.1(c) review governing consideration.

ARGUMENT

It is the contention of Petitioners that the auction provisions of 12 U.S.C. § 215(d) may only be lawfully satisfied by the auction of stock of a national banking association and that the attempt by Respondents to instead auction stock of a holding company incorporated under state law does not and cannot comply with either the express statutory language of section 215(d) or the intent of Congress.

Section 215 of Title 12 of the United States Code provides the statutory authority for the consolidation of national or state banks with one or more national banks under a national bank charter. Subsection (a) of 215 requires an agreement to consolidate by a majority of the board of directors of each bank that is a party to the consolidation proposal and a subsequent ratification of this agreement by at least two-thirds of the shareholders of each affected bank and final approval of the consolidation by the Comptroller. Subsection (b) of 215 then goes on to state that any shareholder who voted against the plan of consolidation which has been duly approved by the necessary majorities of shareholders and the Comptroller, or any shareholder who had given prior written notice of his dissent from said plan of consolidation shall be entitled to receive the value of the shares he holds as of the date

of the consolidation if a written request is made to the consolidated association within thirty days from the date of the consummation of the consolidation. Subsection (c) of 215 sets up a three-person committee to ascertain the value of the shares held by any dissenting shareholder. If within ninety days from the date of consolidation the appraisal committee provided for by subsection (c) has either not been selected or, if selected, not ascertained a value for dissenting shareholders' stock, subsection (d) of 215 states that the Comptroller shall then cause an appraisal to be made which shall be final and binding on all parties. Section 215(d) then provides that,

> [T]he value of the shares ascertained [by the Comptroller's appraisal] shall be promptly paid to the dissenting shareholder by the *consolidated banking association.* Within thirty (30) days after payment has been made to all dissenting shareholders as provided for in this section, the shares of stock of the *consolidated banking association* which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the *consolidated banking association* at an advertised public auction.....and the *consolidated banking association* shall have the right to purchase any such shares at such public auction, if it is the highest bidder therefore, for the purpose of reselling such shares within thirty (30) days thereafter....

12 U.S.C. § 215(d) (emphasis added). If the public auction just mentioned occurs and the shares are sold at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholder.

As is evident from a reading of the Statement Of The

Case previously set forth in this application, as well as the fact findings of the district and appellate courts upon which the case statement was predicated; Respondents have met all necessary § 215 prerequisites to the acquisition of First National I by Bancorp. Moreover, Petitioners have taken all steps required to preserve their rights as dissenting shareholders from the plan of consolidation. As such, and as the District Court so concluded, the "auction" provisions of § 215(d), the final step contemplated in the consolidation procedure, is now properly amenable to analysis and examination by this Court. *See* Appendix C.

As can be easily observed, section 215 of Title 12 is replete with references to "consolidated banking associations". A literal reading of section 215, coupled with a review of its legislative history and a comparison with its companion statute, 12 U.S.C. § 215a, must necessarily lead this Court to the conclusion that "consolidated banking association", as used in the context of the auction provision of section 215(d), can only refer to First National II and not Bancorp.

Throughout the national banking laws, the term "banking association" clearly refers to a national bank. For example, 12 U.S.C. § 215 provides for the consolidation of national banks or state banks with national banks. Subsection (a) provides, "[a]ny national banking association or any bank incorporated under the laws of any State may...be consolidated with one or more national banking associations...under the charter of a national banking association on such terms and conditions....ratified and confirmed by the affirmative vote of shareholders of each such association or bank...." Throughout the statute a state bank is referred to as a bank, while a national bank is referred to as a national banking association or simply as an

association. Subsection (b) of 12 U.S.C. § 215 provides for the liabilities of the two consolidating banks. The statute provides that the consolidated association shall be liable for all liabilities of the consolidating banks or associations and that the capital stock of the consolidated association shall not be less than that required for the organization of a national bank in the place where it is located. It is clear from a reading of this section that "consolidated association" refers to the national bank which results from a consolidation of two separate banks under section 215. It would be totally inconsistent with the clear meaning of the statute to hold, that in subsection (d) the term "consolidated banking association" refers to something other than the national bank which results from the consolidation of two banks under 12 U.S.C. § 215.

Petitioners would further point out to this Court that 12 U.S.C. § 215 was approved in its present form on September 8, 1959. The statute contains a requirement that the stock of the consolidated banking association be sold at a public auction. In light of the Securities Act of 1933, it is highly unlikely that a national banking law would be enacted which requires that stock be sold at a public auction, if the stock which was to be sold was not bank stock exempt from the registration provisions of the Securities Act of 1933. If the stock which is to be sold is the stock of a business corporation, such as a bank holding company, that stock must be registered before it can be offered at a public auction. The expenses of registering the stock would typically far exceed any amount which could be received from the public auction of the stock. It would be illogical to mandate a public auction of stock, except in rare circumstances, if the stock would first have to be registered under the Securities Act of 1933. Therefore, the only logical conclusion is that the framers of 12 U.S.C. §

215 were requiring that the stock of a bank, exempt from registration, would be sold at a public aucation.

Further buttressing this point is the explicit permission given to the consolidated banking association in section 215(d) to purchase the stock at the public auction, if it is the highest bidder, for the purpose of reselling such stock. Such provision is meaningless if the stock which is to be sold and bid on by the selling organization is the stock of a business corporation. A business corporation would need no permission to purchase its own shares at a public auction if it were the highest bidder, nor should it be required to then resell the shares in a private sale. However, national banking associations are prohibited by the provisions of 12 U.S.C. § 83 from purchasing or holding shares of their capital stock, unless the purchase was necessary to prevent a loss upon a debt previously contracted in good faith. Furthermore, 12 U.S.C. § 83 provides that any stock so acquired shall be sold at a public or private sale within six months. Therefore, a national banking association requires explicit statutory authority to purchase shares of its own stock, which explicit statutory authority is granted to the consolidated banking association in 12 U.S.C. § 215. The requirement under section 215 that the purchased stock be subsequently sold is consistent with the prohibition against national banks owning shares of its own stock.

Title 12 of United States Code § 215, which provides for consolidation, has a companion statute in 12 U.S.C. § 215a, which provides for the merger, rather than the consolidation, of national banks or state banks into national banks. Subsection (d) of section 215a provides the same rights, with some minor differences, to dissenting shareholders of a bank which has merged into another bank as 12 U.S.C. § 215(d) provides Petitioners. In particular,

section 215a(d) states: "[t]he shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction...." The term "receiving association" is defined in 12 U.S.C. § 215b, Definitions, which provides in part, "[a]s used in [sections 215-215(b) of this Title], the term...'Receiving Association' means the national banking association into which one or more national banking associations or one or more State banks, located within the same State, merge." Apparently, 12 U.S.C. § 215b the definition statute, was intended to cover both the consolidation and merger provisions. However, because of the different terminology used in consolidation rather than merger, the definition of receiving association is not as clearly applicable to the consolidation statute as it is to the merger statute. However, as applied to the merger statute, there is no doubt that the stock that is to be sold is the stock of the bank which survives the merger and not the stock of any other entity.

The statutory rights and protections afforded dissenting shareholders under section 215, the consolidation statute, and section 215a, the merger statute, are substantially identical. The Fifth Circuit considered the question of whether the two statutes provided different rights to dissenting shareholders in *Ellis v. State National Bank of Alabama*, 434 F.2d 1182 (5th Cir. 1970). The court in *Ellis* held that 12 U.S.C. § 215a, which was passed at the next Congressional term after section 215, was intended to provide for state to national bank mergers, and not to provide different rights to shareholders who dissented from a merger rather than a consolidation. *Id.* at 1188.

The legislative history of 12 U.S.C. § 215 also

indicates that the stock which is to be sold is the stock of a national bank. A statute providing for the consolidation of national banking associations was originally enacted on November 7, 1918, and was thereafter formally classified to 12 U.S.C. §§ 33-34c. These sections were amended and reclassified in 1959 to 12 U.S.C. §§215-215b. Former § 34a which provided for consolidation of state banks and national banks, stated in part, in the section dealing with the rights of dissenting shareholders, that after the appraisal the appraised value should be paid to the shareholders by the consolidated association, and "...the shares so paid for shall be surrendered and, after due notice, sold at a public auction within thirty (30) days after the final appraisement provided for in this section; and if the shares so sold at the public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder..." The former consolidation statute thus clearly required that the shares of a national banking association be sold at a public auction. Amendment and reclassification of the former merger and consolidation statutes to 12 U.S.C. § 215 *et seq.* is discussed in the 1959 United States Congressional and Administrative News at page 2237. The discussion notes that the amendments are proposed "...in order to make uniform the provisions relating to these consolidations and mergers and to eliminate certain ambiguities." The discussion regarding the Congressional intent of these statutes goes on to list the substantive changes made when 12 U.S.C. § 33 *et seq.* was amended and reclassified to the current statutes. The discussion states: "It [the amending act] would eliminate differences in the legal requirements for publication, the requirements of notice of shareholders' meeting, the waiving of such notice, the procedure to be followed in determining dissenters' rights, and the payment for the expense of appraisal or reappraisal made by the Comptroller. It would

also eliminate existing ambiguities as to the length of time a dissenting shareholder may delay before proceeding with an appraisal, the time within which a dissenter's stock must be surrendered, the length of time which must elapse before the Comptroller can be asked to make a reappraisal, and the disposition of the stock of dissenters."

"The amendments contained in Section 20 of the bill were intended only to improve the procedural and technical provisions relating to consolidations and mergers. The committee did not intend to affect in any way the substantive authority of banks to consolidate or merge, or the authority of the Comptroller to review and approve such consolidations and mergers." It is clear from this discussion that Congress, in enacting the current 12 U.S.C. § 215, did not intend to change a provision as important and as central to the statutory scheme as that providing for the sale of stock of the Bank held by dissenting shareholders. The discussion lists in detail minor changes made in the statute, but nowhere does it imply that the stock which is to be sold at public auction is now the stock of an unregulated business corporation rather than the stock of a national banking association.

Both the Fifth Circuit and the district court ignored Congress' clear and unambiguous use of the term "consolidated banking association" in section 215(d) and instead chose to focus on the protion of section 215(d) stating that "shares of stock...which would have been delivered to such dissenting shareholders had they not requested payment...." Placing heavy emphasis on this phrase, the Fifth Circuit, in effect, based its holding in favor of Respondents upon the fact that shareholders agreeing to the consolidation of First National I and First State ultimately received Bancorp stock. However, it is the position of Petitioners

that what is relevant to the proper resolution of the question before this Court is not what stock shareholders agreeing to the consolidation received at the conclusion of the entire reorganization, but what stock dissenting shareholders should have received based upon their opposition to the consolidation of First National I and State Bank.

The ultimate goal of the Fender interests' reorganization effort was to change First National I's ownership from that of individual shareholders to that of a bank holding company. As mentioned in the Statement of the Case, the Fender interests could not acquire the needed 80% of First National I's stock by a direct tender offer. The only way to effectively neutralize this large bloc of opposition to holding company ownership of First National I was to consolidate it with another bank. Ironically, this meant that in order for the Fender interests to own First National I through their holding company, they had to destroy First National I and create First National II. This is why Bancorp now owns 100% of the stock of an entirely new entity (First National II) and not the old entity (First National I).

Petitioners vehemently opposed the erasure of the legal identity of First National I resulting from its consolidation with a sham bank incorporated solely for that purpose by the Fender interests. Petitioners did not want to give up their shares in First National I for shares in First National II. However, when the shareholders meeting was called and the votes were counted, the necessary two-thirds majority agreed to turn First National I into First National II. As dissenters to this consolidation, Petitioners were entitled to the appraised value of their First National I stock and to the excess over and above this value generated by a public auction of the stock in the new consolidated entity (First National II). Entitlement to these basic dissenters'

rights was not something conjured up by Petitioners, but was plainly due them based upon a simple reading of section 215(d).

After the consolidation phase was completed, the shareholders of First National II (the nondissenters) then received stock in Bancorp as payment for their interest in First National II. The exchange phase of the reorganization was a matter strictly between the nondissenting shareholders, who now owned First National II, and Bancorp. Petitioners had already taken themselves out of this part of the reorganization due to their opposition to the first step of the reorganization. Therefore, the stock of the consolidated banking association Petitioners would have, or should have, received but for their dissent was First National II stock. Respondents attempt to auction Bancorp stock in lieu of First National II stock is therefore in clear violation of 12 U.S.C. § 215(d).

In answer to these arguments the Fifth Circuit stated, "[w]e reject [Petitioners'] request to characterize the reorganization as a two-step transaction. The Agreement and Plan of Consolidation clearly provides one step: the exchange of First National I stock for Bancorp shares." *Martin v. Kilgore First Bancorp, Inc.*, 747 F.2d 1024, 1027 (5th Cir. 1984) (also Appendix B). By reason of this statement, Petitioners believe the Fifth Circuit missed the point of their argument, *i.e.*, Petitioners are not arguing Respondents' written plan of reorganization called for a two-step procedure, in fact Respondents, knowing they would have to pay Petitioners' the full and fair value of their stock if the proper two-step procedure was followed, deliberately and intentionally attempted to draft its reorganization plan so as to eliminate the initial consolidation step. Petitioners do not misapprehend either the terms

of Respondents' reorganization or their motivation in drafting the plan to suit the Fender interests. Petitioners are urging, however, that Respondents' one-step plan of reorganization is invalid because it attempts to inject a nonbanking business corporation (Bancorp) into a statute (section 215) where it has no place.

The Fifth Circuit erred in its assumption that Respondents are entitled to subvert the purposes of section 215(d) by converting what is conceptually, and properly, a two-step procedure into a one-step procedure through the use of a reverse triangular merger. The initial consolidation and the subsequent exchange of holding company stock for the stock of the newly consolidated entity are two entirely different transactions. They are separate and distinct undertakings and this Court should not allow Respondents to say the magic words "reverse triangular merger" and turn a clear two-step procedure into a single transaction. Whatever usefulness the reverse triangular merger method of acquisition may have in standard business practice, it should have no application in consolidations involving national banking associations because it deprives dissenting shareholders of rights guaranteed to them by section 215(d).

The Fifth Circuit held that the "language of section 215(d) is ambiguous, if not internally contradictory, when applied to a reverse triangular merger." *Id.* (also Appendix B). However, the language and intent of section 215(d) are clear and unambiguous when the statute is used in the way Congress intended it to be used, that is, when it is applied strictly to bank consolidations. It is easy to raise ambiguities and inconsistencies in section 215(d) when a nonbanking business corporation is wrongly thrust into a role that is properly to be occupied by a banking association

that has been newly formed as a result of the previous consolidation of two separate banking entities. The Fifth Circuit traces its notion that section 215(d) is ambiguous to the fact that Congress has not further modified the statute to accommodate newly developed merger mechanisms such as reverse triangular mergers. By this reasoning, the Fifth Circuit admits that section 215(d) was unambiguous when it was last considered by Congress in 1959, but that it has since been made ambiguous because parties have, through newly concocted merger procedures, tried to utilize the statute in situations not contemplated by Congress. This type of reasoning should not be condoned by this Court. An unambiguous statute should not be used for purposes for which it was not intended and then declared "ambiguous" in the context of that improper use. Section 215(d) is not ambiguous; it clearly calls for the auction of First National II stock in this instance.

The Fifth Circuit also pointed out that "[t]he Comptroller, who appeared *amicus curiae* during the district court proceedings and on appeal, urges the adoption of the construction [of section 215] advanced by [Respondents]." *Id.* (also Appendix B). The Fifth Circuit, and it appears the district court, accorded "substantial deference" to the Comptroller's interpretation of section 215(d). As to the Comptroller's position in this lawsuit, Petitioners would point out two matters for the Court's consideration. First, the Comptroller knows that if Bancorp stock is auctioned, as opposed to First National II stock, there will be no further payments that will have to be made to Petitioners because an auction of that stock will not generate any excess over the appraised value of their First National I stock. The reason for this is Respondents' candid admission in the Bancorp prospectus that there is no market for Bancorp stock. "There is currently no market for the

securities of [Bancorp] and it is unlikely that a market will develop as a result of this offering. Therefore, shareholders may not be able to readily liquidate these securities in case of a personal financial emergency or otherwise." Appendix D. "As previously discussed, there is currently no public trading market for the securities of [Bancorp] and it is unlikely that a market will develop as a result of this offering." Appendix D—A-51. Because Bancorp will not have to disgorge substantial payments to compensate the dissenting shareholders for the inevitable excess over appraised value that would be generated by an auction of First National II stock, Bancorp will be in a more financially stable condition because the monies rightly belonging to Petitioners will be retained by Bancorp. The Comptroller is interested in the financial soundness of the institutions he supervises and it is to be expected that he will interpret a statute in such manner as to preserve that goal.

Second, the Comptroller would be put in an embarrassing position if he agreed with Petitioners. By the Comptroller's own estimate, it appears that he processed approximately 150 interim bank merger applications per year throughout the 1970's and in 1982 he processed 183 such applications, and 194 in 1983. To now agree with petitioners that section 215(d) requires the auction of the stock of the consolidated banking association instead of the holding company would mean that the Comptroller would have admitted that the many previous mergers he approved that provided for auction of holding company stock would have been in violation of federal law. It is easy to see why the Comptroller would not want to admit an error of this magnitude at this point in time and, therefore, why he joins the Respondents' position, which is essentially, "everybody else has been doing it this way so that makes it right." This type of justification for violations of the law

have never merited an ounce of serious consideration by any court of law and never will. Petitioners have called attention to a serious breach of federal banking law and the Comptroller, the district court, and the Fifth Circuit have all passed the buck on this fact. This Court should stop the buck and declare that Respondents' proposed plan of reorganization is in conflict with the express provisions of section 215(d).

The last issue to be addressed is the so-called "windfall" Petitioners will receive if First National II stock is auctioned. As correctly stated by the Fifth Circuit, "[s]ection 215(d) was enacted to protect the dissenting shareholders in a consolidation involving a national bank by providing a means whereby the dissenters would receive full value for their stock." *Id.* (citing *Central-Penn National Bank v. Portner,* 201 F.2d 607, 609 (3d Cir. 1953). The Comptroller and the Fifth Circuit have taken the position that the Comptroller's appraisal of the dissenters' stock is the only step necessary to protect their right to be paid the full value of their stock. Apparently, the Fifth Circuit believes that the auction provision of section 215(d) plays no part in guaranteeing that Petitioners receive full value for their stock; in its opinion the auction provision is only designed to secure to the dissenters the same economic benefits as the nondissenters realize from the consolidation transaction. The only problem with this position is deciding which nondissenters benefits are to be considered.

The nondissenting shares controlled by the Fender interests (approximately 63% of First National I stock) received almost total control over First National II through its holding company, preferential treatment for its acquisition debt as well as the other tax advantages; all at the expense of the minority shareholders. The

nondissenters from the plan of reorganization who were not aligned with the Fender interests (approximately 13% of the First National I stockholders) receive a 12% subordinated debenture and a share of holding company stock with no reliable market value. Which economic "benefit" are the dissenters to the consolidation (approximately 25% of the First National I stockholders) to receive? Respondents would certainly not say Petitioners should receive the benefits enjoyed by the Fender interests nondissenters, but if they are instead entitled to the non-Fender interests shareholders "benefit", an unjust result would follow. Petitioners would get the "benefit" of an auction of stock with no market, at least non-Fender Bancorp shareholders might be able to hold their stock until such time, if ever, a market develops for the stock. Petitioners would not have this choice since "their" Bancorp stock would be subject to immediate auction. This illustrates the unfair position Petitioners would be put in if the Fifth Circuit's erroneous construction of section 215(d) is allowed to stand. The real windfall in this whole reorganization is being enjoyed by the Fender interests. To suggest that Petitioners will be reaping a windfall by merely asking for and receiving their statutorily secured right to be paid the full value for their stock is disengenious at best.

CONCLUSION

Respondents, based on their interpretation of 12 U.S.C. § 215(d), would have the Court approve an auction of apples to arrive at the fair value of oranges. The fact that the apples are rotten (no market) apples only exacerbates the inequity. It cannot be the intent of Congress to allow a thin majority of bank shareholders to run roughshod over a group of minority stockholders. If this Petition is denied and the Fifth Circuit decision is allowed to remain

uncorrected, this is exactly the result this Court will be endorsing. The Court should exercise its discretion in favor of granting a Writ of Certiorari to the Fifth Circuit Court of Appeals in this matter in order to decide the question of which entity's stock must be auctioned to satisfy the requirements of 12 U.S.C. § 215(d). Petitioners earnestly believe this important question of federal law should be reviewed and settled by this Honorable Court and it is for this reason that Petitioners respectfully pray for issuance of a Writ of Certiorari from this Court to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES H. CLARK
P. O. Box 98
Tyler, Texas 75710

Charles H. Clark
Bar I.D. No. 04274000
Telephone: 214/593-2514

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Respondents by depositing said Petition in a United States post office, with first-class postage prepaid, addressed to Respondents' counsel of record, Richard Grainger, Esq., P.O. Box 491, Tyler, Texas 75710 and Beth Fielding Siever, P.O. Box 2241, Austin, Texas 78768.

All parties required to be served have been served.

_____

Charles H. Clark

APPENDIX "A"

CONSOLIDATION AND MERGER

§215. Consolidations under national charter

(a) Approval of Comptroller, board and shareholders; terms and conditions; notice. Any national banking association or any bank incorporated under the laws of any State may, with the approval of the Comptroller, be consolidated with one or more national banking associations located in the same State under the charter of a national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or bank is located, or, if there is no such newspaper, then in the paper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State bank.

(b) Liability of consolidated association; capital stock; dissenting shareholders. The consolidated association shall be liable for all liabilities of the respective consolidating banks or associations. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: Provided, That if such consolidation shall be voted for at such meetings by the necessary majorities of the shareholders of each association and State bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller, any shareholder of any associations or State banks so consolidated who has voted against such consolidation at the meeting of the association or bank of which he is a stockholder, or who has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him when such consolidation is approved by the Comptroller upon written request made to the consolidated association at any time before thirty days after the date of consummation of the consolidation, accompanied by the surrender of his stock certificates.

(c) Valuation of shares. The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the consolidation, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the consolidated banking association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment,

that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) Appraisal by Comptroller; expenses of consolidated association; sale and resale of shares; State appraisal and consolidation law. If, within ninety days from the date of consummation of the consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the consolidated banking association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the consolidated banking association. Within thirty days after payment has been made to all dissenting shareholders as provided for in this section the shares of stock of the consolidated banking association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the consolidated banking association at an advertised public auction, unless some other method of sale is approved by the Comptroller, and the consolidated banking association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders the excess in such sale

price shall be paid to such shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such consolidation shall be in contravention of the law of the state under which such bank is incorporated.

(e) Status of consolidated association; property rights and interests vested and held as fiduciary. The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating banks or banking associations at the time of consolidation, subject to the conditions hereinafter provided.

(f) Removal as fiduciary; discrimination. Where any consolidating bank or banking association, at the time of the consolidation, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such consolidating bank or banking association prior to the consolidation. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such manner as to discriminate against national banking associations, nor shall any consolidated national banking association be removed solely because of the fact that it is a national banking association.

(g) Issuance of stock by consolidated association; preemptive rights. Stock of the consolidated national banking association may be issued as provided by the terms of the consolidation agreement, free from any preemptive rights of the shareholders of the respective consolidating banks. (Nov. 7, 1918, c. 209, § 1, as added Sept. 8, 1959, P.L. 86-230, § 20, 73 Stat. 460.)

APPENDIX "B"

R.S. MARTIN, Jr.,

Plaintiff-Appellant,

v.

KILGORE FIRST BANCORP, INC. and Kilgore First National Bank,

Defendants-Appellees.

Nos. 83-2662, 84-2199

United States Court of Appeals,
Fifth Circuit.

Dec. 7, 1984.

Dissenting minority shareholders in bank absorbed in reverse triangular merger moved for partial summary judgment on claim that statute protecting rights of dissenting shareholders in a bank consolidation required auction of surviving bank's stock instead of shares in bank holding company chartered under state law. The United States District Court for the Eastern District of Texas, William M. Steger, J., entered order denying motion, and certified question for interlocutory appeal. The Court of Appeals, Clark, Chief Judge, held that statute dealing with rights of dissenting stockholders in a consolidation involving a national bank did not require auction of stock of surviving bank in reverse triangular merger; rather, demands of statute were satisfied by auction of stock in bank holding company chartered under state law.

Affirmed.

Appeals from the United States District Court for the Eastern District of Texas.

Before CLARK, Chief Judge, JOHNSON, and WILLIAMS, Circuit Judges.

CLARK, Chief Judge:

Plaintiffs seek review of rulings of the district court (i) refusing to enjoin the sale of bank holding company stock to satisfy the requirements of 12 U.S.C. § 215(d), and (ii) denying a motion for summary judgment on their claim that the same section requires the auction of stock in a national banking association, rather than stock in a bank holding company chartered under state law. The district court certified the second question for interlocutory appeal as a controlling question of law pursuant to 28 U.S.C. § 1292(b).

We find that in the type of transaction at issue here the demands of section 215(d) are satisfied by the auction of stock in the bank holding company and affirm the district court.

I

Plaintiffs were minority shareholders in Kilgore First National Bank (First National I). Sometime in 1980 or 1981 a majority of the board of directors of First National I decided to convert the bank's ownership from individual shareholders to a bank holding company. A reverse triangular merger was chosen to achieve the conversion. This type of merger has three phases; (1) the principals of an existing bank establish a bank holding company; (2) these same principals then apply to the appropriate authorities to charter an interim bank which is owned wholly by the holding company; and (3) the

directors of both the original bank and the interim bank agree to merge or consolidate the two banks, subject to the approval of the Comptroller of the Currency (Comptroller), thereby forming the surviving bank. In this type of merger or consolidation agreement, shareholders of the existing bank exchange their shares for shares in the holding company.

Dissenting shareholders of the existing bank are entitled to the protections afforded by 12 U.S.C. § 215(d); they must be paid the appraised value of the shares they formerly owned and receive any excess over that value generated by an auction of the shares of the consolidated banking association which they would have received but for their dissent. The nondissenting shareholders of the original bank become the owners of all stock in the holding company, which in turn owns all of the stock of the survivng bank.

The board of First National I chose the reverse triangular merger method of changing ownership because of the tax advantages it offered. If the holding company acquired at least 80% of the stock in the surviving bank, the exchange would be tax free. Because 25% of the shareholders in First National I indicated they would dissent from the consolidation plan; the exchange would have been fully taxable if a traditional tender offer had been used. The reverse triangular merger enabled the board to eliminate the dissenters so that the bank holding company would be able to acquire all the stock in the surviving bank, and avoid any tax liability on the exchange for the shareholders.

To implement the reverse triangular merger, a majority of the directors applied to the Federal Reserve Board

for prior approval of the formation of a bank holding company. On July 20, 1981 these same directors formed a Texas corporation, Kilgore First Bancorp, Inc. (Bancorp) for the express purpose of acquiring and holding all the outstanding stock of the surviving bank. The directors then secured a charter for an interim or "phantom" bank, New Kilgore First State Bank (First State), from the Commissioner of the Texas Banking Department on May 18, 1982. First State was formed only to serve the interim function of a controlled subsidiary needed to execute the reverse triangular merger. The Federal Reserve Bank of Dallas approved Bancorp's application to become a bank holding company on January 19, 1982.

The directors presented their plan of consolidation to the shareholders of First National I in a proxy statement that was accompanied by a prospectus of Bancorp on September 30, 1982. The Federal Deposit Insurance Corporation and the Comptroller approved the consolidation five days later.

Plaintiffs voted against the consolidation at the October 22 meeting, thereby becoming dissenting shareholders within the provisions of 12 U.S.C. §215(b)-(d), which governs the consolidation of national or state banks with national banks. On March 16, 1983 the Comptroller, pursuant to section 215(d), gave notice of his intent to cause an appraisal of the shares of First National I held by the dissenters. These individuals were later paid the appraised value of their First National I stock which was $279.69 per share. Bancorp subsequently scheduled a public auction of its stock to comply with the second potential payment requirement of section 215(d).

Prior to the auction date plaintiffs filed suit against

Bancorp and the surviving bank, Kilgore First National Bank (First National II), challenging the results of the Comptroller's appraisal, as well as the propriety of his action in making the appraisal at all. They also sought a temporary restraining order and a preliminary injunction to stop the scheduled auction of Bancorp stock, contending that section 215(d) required the auction of First National II stock.

The district court granted the temporary restraining order against the auction on July 26, 1983, but on November 22, 1983, the court denied the requested preliminary injunction and dissolved the temporary restraining order. Plaintiffs appealed that order to this court.

Bancorp chose not to proceed with the sale. Plaintiffs later moved for partial summary judgment on their claim that section 215(d) required the auction of First National II stock instead of Bancorp shares. The district court certified to this court its denial of the motion. Plaintiff filed this appeal based on that certification which we have accepted. 28 U.S.C. § 1292(b).

II

The only issue before us is the application of the following portion of 12 U.S.C. § 215(d) to the consolidation described in Part I of this opinion.

> Within thirty days after payment has been made to all dissenting shareholders as provided for in this section the shares of stock of the consolidated banking association which would have been delivered to such dissenting shareholders

> had they not requested payment shall be sold by the consolidated banking association at an advertised public auction....If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders the excess in such sale price shall be paid to such shareholders.

Our resolution of this question necessarily will dispose of plaintiffs' appeal from the denial of their request for a preliminary injunction against the sale of Bancorp stock.

A

Plaintiffs maintain that the reorganization should be viewed as involving two steps: (1) the consolidation of First National I and First Bank into First National II and (2) the exchange of First National II shares for Bancorp shares. They insist that they dissented to the first step, the consolidation. Bancorp was not involved in this part of the transaction. According to their argument, if the plaintiffs had not dissented at this point, they would have received shares in the surviving bank, First National II, not Bancorp. Therefore, section 215(d) requires the auction of First National II shares, not stock in Bancorp. Moreover, they contend, the statute requires auction of the shares of a national "consolidated banking association." Bancorp, they point out, is a Texas corporation, not a national banking association.

Defendants reply that the reorganization, as set forth in the Agreement and Plan of Consolidation approved by the majority of shareholders in First National I and by the Comptroller, was a one-step transaction: shareholders of First National I tendered their stock in exchange for Bancorp shares. They admit that Bancorp is not a national

banking association as described in the statute, but urge us to focus instead on the later phrases "[shares] which would have been delivered to such dissenting shareholders had they not requested payment...." Those shareholders who did not dissent to this transaction received Bancorp shares.

There is no basis in fact for plaintiffs' claim that they would have received First National II stock but for their dissent. No shares in First National II were ever issued. Ordering the issuance and auction of First National II stock would not only ignore the realities of the transaction legally chosen by the majority stockholders, but would also defeat section 215's purpose. That purpose is to ensure that dissenters realize the same economic benefits as non-dissenters. Restructuring the real transaction could give dissenters a windfall since stock in the surviving bank may often be more valuable than holding company stock. Defendants claim it is here.

The Comptroller, who appeared *amicus curiae* during the district court proceedings and on appeal, urges the adoption of the construction advanced by defendants.

B

We reject plaintiffs' request to characterize the reorganization as a two-step transaction. The Agreement and Plan of Consolidation clearly provides one step: the exchange of First National I stock for Bancorp shares. Plaintiffs' argument would be feasible only if the agreement had provided for the exchange of First National I shares for those of First National II and then a separate exchange of the First National II shares for Bancorp stock.

Undeniably, the plain language of section 215(d) is

ambiguous, if not internally contradictory, when applied to a reverse triangular merger. As plaintiffs point out, the statute requires auction of the stock of a consolidated national banking association and Bancorp is not such an organization. Defendants, however, are equally correct in their assertion that the statute requires auction of the shares the dissenters would have received if they had not dissented. In this case plaintiffs would have received Bancorp stock as did the shareholders who did not dissent. Their claim that they would have received shares in First National II but for their dissent is without merit because no such shares were ever issued.

The ambiguity in the statute is the result of changes in the forms of entities now used to conduct banking business. Reverse triangular mergers, using an interim or "phantom" bank to transfer ownership of a national bank to a one-bank holding company, were not devised until the mid-1960's. Section 215(d) was enacted in 1918 and last amended in 1959. Congress has not further modified the statute to accommodate newly developed merger mechanisms such as that presented here despite the fact that the Comptroller and the Federal Reserve System have consistently recognized the use of these new business forms and merger procedures.

C

Regardless of the age of the ambiguity, our duty is to interpret the words of the statute to further the purpose Congress sought to accomplish by its enactment. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 994, 74 L.Ed.2d 845 (1983); *WTWV, Inc. v. National Football League*, 678 F.2d 142, 143 (11th Cir.1982). Because the Comptroller has the primary responsibility for

regulating consolidations involving national banks, we will accord substantial deference to his interpretation of section 215(d) where it represents a reasonable construction of the language and is consistent with the legislative intent. *See Securities Industry Association v. Board of Governors*, __ U.S. __, 104 S.Ct. 2979, 2983, 82 L.Ed.2d 107 (1984).

Section 215(d) was enacted to protect the dissenting stockholders in a consolidation involving a national bank by providing a means whereby the dissenters would receive full value for their stock. *Central-Penn National Bank v. Portner*, 201 F.2d 607, 609 (3d Cir.1953) (citing H.R.Rep. No. 408, 65th Cong., 2d Sess. (1918); S.Rep. No. 406, 65th Cong., 2d Sess. (1918)). Congress intended to ensure that the dissenters would receive the same economic benefits as nondissenting shareholders.

The auction of Bancorp shares will place these plaintiffs in a position as nearly equal to that of the nondissenting shareholders as their dissent will permit. The nondissenters holding stock in First National I were never given the option of receiving First National II stock instead of Bancorp shares. If the dissenters are permitted to force the auction of First National II shares they could receive an economic return different from that realized by the nondissenters who could only own stock in a different concern. As the Comptroller notes, shares of First National II could be more valuable than Bancorp shares because individual ownership of some shares of First National II would give the owners disproportionate leverage in management. Such stock might also have a premium value because of its attractiveness to a multibank holding company seeking to take over First National II.

At oral argument plaintiffs contended that even if

the First National II shares are more valuable than the Bancorp shares received by the nondissenters, this does not represent a windfall to the dissenters. It only ensures they receive the full value of their First National I shares as intended by section 215(d). However, that is not the purpose of the auction provision. The appraisal process established in section 215(d) protects plaintiffs' right to receive the full value of their First National I shares. The adequacy of their compensation for those shares is a function of the appraisal process. That process should not be confused with the separate statutory requirement to auction the stock of Bancorp which was received by the nondissenters.

The auction step is designed to secure to the dissenters the same economic benefits as the nondissenters realize from the consolidation transaction. To allow plaintiffs to force the issuance and auction of stock to which the nondissenters did not have access could allow plaintiffs to realize a greater profit from the transaction than the nondissenters. This could destroy the parity intended by the statute.

Accepting plaintiffs' contention that the auction of First National II shares was required because Bancorp is not a consolidated national banking association would not advance the purposes of the statute. Such a construction would produce an unreasonable result which is "plainly at variance with the policy of the legislation as a whole...." *United States v. Mendoza*, 565 F.2d 1285, 1288-89, *modified on other grounds*, 581 F.2d 89 (5th Cir.1978) (en banc) (quoting *Perry v. Commerce Loan Co.*, 383 U.S. 392, 86 S.Ct. 852, 857, 15 L.Ed.2d 827 (1966)). The court would be required to order the issuance of First National II stock for the auction, despite the fact that the agreement did not

provide for the issuance of such stock. The reverse triangular merger plan adopted by the majority of the shareholders in First National I to convert the bank to holding company ownership while avoiding tax liabilities was a legitimate transaction. Ignoring it could give plaintiffs a windfall. We refuse to follow this course.

III

The legislative intent which produced section 215(d) is best served by construing its terms to require the auction of stock in the bank holding company and not of the surviving bank in a reverse triangular merger. The orders of the district court are

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

NO. TY-83-291-CA

R. S. MARTIN, JR.

VS.

KILGORE FIRST BANCORP, INC.
and KILGORE FIRST NATIONAL BANK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled and numbered cause was filed by Plaintiff, R.S. Martin, Jr., on July 19, 1983, against Kilgore First Bancorp, Inc. and Kilgore First National Bank. Plaintiff by way of his first amended complaint sought from the Court, *inter alia*, a temporary restraining order enjoining the sale of certain bank stock scheduled for July 29, 1983. On July 26, 1983, the Court granted Plaintiff's application for a temporary restraining order and enjoined Defendants from auctioning the bank stock in question. A hearing on the preliminary injunction requested by Plaintiff was set for August 4, 1983. The Court, acting on the motion of Plaintiff, extended its temporary restraining order an additional ten days on August 3, 1983. The hearing on Plaintiff's application for preliminary injunction was rescheduled to August 15, 1983.

On August 15, counsel for both parties, in open court, agreed to extend the Court's temporary restraining order for a period of thirty days to allow additional time for further briefing of the legal issues raised by this lawsuit.

By agreed order dated August 18, 1983, the temporary restraining order was extended and the hearing on the preliminary injunction postponed until September 14, 1983. On September 14, the parties submitted a second agreed order to extend the Court's temporary restraining order to October 12, 1983, so that the Office of the Comptroller of the Currency (the Comptroller) could submit an *amicus curiae* brief for the Court's consideration prior to the preliminary injunction hearing.

The parties appeared before the Court on October 12, 1983, and announced that they were prepared to proceed. The Court queried the parties as to whether the controversy over the issuance, *vel non*, of a preliminary injunction in this cause was a dispute over legal issues and not the underlying material facts of the case. Counsel for both parties answered the Court in the affirmative. At that point the Court indicated that Plaintiff's application for a preliminary injunction would be denied. In conformity with Fed.R.Civ.P. 52(a) and in conformity with the Court's intent expressed on October 12, 1983, the Court makes the following findings of fact and conclusions of law in support of its Order entered this day denying Plaintiff's application for preliminary injunction in all respects. Any finding of fact which constitutes a conclusion of law shall be deemed a conclusion of law and any conclusion of law which is a finding of fact shall be deemed a finding of fact.

FINDINGS OF FACT

The following are facts gleaned by the Court from the pleadings, motions, exhibits, briefs and representations of counsel in this case.

Sometime in 1980 or 1981, a majority of the board of

directors of Defendant Kilgore First National Bank (KFNB) deemed it to be in the best interests of KFNB and its shareholders to convert from individual shareholder ownership of KFNB to holding company ownership. The board of directors determined that the change of ownership of KFNB could best be accomplished through the use of an acquisition vehicle known as a reverse triangular merger. This is a three party merger involving a parent company, a controlled subsidiary and a target company. The parent company forms a controlled subsidiary company which combines with the target company. If the combination of the subsidiary and target companies results in one of the companies continuing to exist while the other ceases to exist, the combination is classified as a merger. However, where both companies cease to exist and a new company is formed as a result of the transaction, which is what happened in the case at bar, the combination is called a consolidation. The acquisition is completed when the shareholders of the target company (which emerges as the surviving entity) exchange their stock for the stock of the parent company. If the parent company can acquire at least eighty percent of the outstanding stock of the surviving entity, then the above mentioned exchange of stock is tax-free. *See* Exhibit "L" of Defendant's Supplemental Brief in Opposition To A Temporary Restraining Order.

In order to take advantage of the reverse triangular merge acquisition method, a majority of the board of directors of KFNB, the target company, applied to the Federal Reserve Board for prior approval of the formation of a bank holding company, which acts as the parent company in the consolidation. Later, on July 20, 1981, a majority of KFNB's directors formed a Texas corporation, Defendant Kilgore First Bancorp, Inc. (Bancorp) for the express purpose of acquiring and holding all the outstanding stock of

KFNB. Bancorp's directors then moved to charter a phantom state bank to act as its controlled subsidiary in the consolidation. This phantom bank, New Kilgore First State Bank (interim bank) subsequently received its certified Articles of Association and a Certificate of Authority to do Business from the Commissioner of the Texas Banking Department on May 18, 1982.

The Federal Reserve Bank of Dallas, acting pursuant to delegated authority, on January 19, 1982, approved the application filed by Bancorp under section 3(a)(1) of the Bank Holding Company Act of 1956 to become a bank holding company. The plan of consolidation was presented to all shareholders of KFNB via a detailed proxy statement of KFNB and a prospectus of Bancorp released on September 30, 1983. The plan of consolidation was approved by a vote of the holders of two-thirds of the outstanding shares of KFNB and of the interim bank at a specially called meeting on October 22, 1982. Thereafter, on October 27, 1983, the Federal Deposit Insurance Corporation and the Comptroller gave their approval to the plan of consolidation. Plaintiff voted against the plan of consolidation, thereby becoming a dissenting shareholder under the terms and provisions of 12 U.S.C. §215(b)(c) and (d). As authorized by section 215(d), the Comptroller, on March 16, 1983, gave notice of his intention to cause an appraisal to be made of the shares of KFNB held by shareholders dissenting from the consolidation of KFNB and the interim bank, effective as of December 3, 1982. This appraisal was initiated at the request of Plaintiff by letter dated February 7, 1983 and at the request of the Defendants by letter dated February 23, 1982.

On June 13, 1982, the Comptroller, after reviewing materials furnished by Bancorp and the dissenting

shareholders, appraised the value of the dissenter's stock at $279.69 per share. Plaintiff was paid the appraised value of his 1705 shares of KFNB stock by Bancorp on June 30, 1982. Subsequently, Bancorp scheduled a public auction of the stock as required by section 215(d) for July 29, 1983. On July 19, 1983, Plaintiff filed suit against Bancorp and KFNB challenging the value placed upon his stock by the Comptroller and the propriety of the Comptroller in making the appraisal in the first instance. Plaintiff also sought a temporary restraining order and a preliminary injunction to stop the scheduled auction of stock by Bancorp because of his contention that section 215(d) can only be satisfied by an auction of KFNB stock. Plaintiff claims that Defendants' intention to auction Bancorp stock would be a violation of 215(d). Based upon this argument the Court, on July 26, 1983, temporarily restrained Defendants from auctioning off Bancorp stock.

CONCLUSIONS OF LAW

The four prerequisites for the issuance of a preliminary injunction are (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the opponent; and (4) that granting the preliminary injunction will not disserve the public interest. *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. 1982). After reviewing the facts in this case as found *supra.* and the applicable law, the Court can come to no conclusion but that Plaintiff has not sustained his burden of proving a substantial likelihood of success on the merits of his claim.

As mentioned earlier, Plaintiff seeks to have the auction of Bancorp stock enjoined because he believes that the express terms of 12 U.S.C. §215(d) mandate that KFNB stock be sold. Section 215 of Title 12 of the United States Code governs consolidations involving national banking associations. The section, in general, provides that two or more banking entities, either state or nationally chartered, may be consolidated under the chartaer of the national bank on the terms and conditions approved by a majority of the board of directors of each bank proposing to consolidate. The plan of consolidation agreed to by a majority of the board of directors of the consolidating banks must then be approved by a two-thirds majority of the shareholders of each bank proposing to consolidate at a meeting called by the directors for such purpose, after specified published notice. Thereafter, the consolidation shall be approved or disapproved by the Comptroller. Any shareholder of a consolidating bank who voted against the plan of consolidation at the above mentioned meeting or gave written notice of his dissension from the plan of consolidation prior to the meeting, is entitled to receive the value of the shares held by him at the time the consolidation is approved by the Comptroller, provided the dissenting shareholder requests payment within thirty days after the plan of consolidation is approved and surrenders his stock certificates. The value of the dissenter's shares are then to be ascertained by a three person committee chosen by the board of directors of the consolidated entity and a majority of its shareholders.

Subsection (d) of section 215 states that if the above mentioned appraisal committee is not selected or, if selected, fails to determine a value for the dissenter's shares within ninety days from the date the plan of consolidation is approved, then the Comptroller shall, upon

written request, cause an appraisal to be made which shall be final and binding on all parties. It then goes on to provide that,

> "[t]he value of the shares ascertained [by the Comptroller's appraisal] shall be promptly paid to the dissenting shareholders by the consolidated baking association. Within thirty days after payment has been made to all dissenting shareholders as provided for in this section the shares of stock of the consolidated banking association *which would have been delivered to such dissenting shareholders had they not requested payment* shall be sold by the consolidated banking association at an advertised public auction...."

12 U.S.C. §215(d) (1976) (emphasis added). If the public auction just mentioned occurs and the shares are sold at a price greater than the amount paid to the dissenting shareholders the excess in such sale price shall be paid to such dissenting shareholders.

As is evident from a reading of the findings of fact in this case, heretofore made by the Court, Defendants have met all necessary prerequisites to the acquisition of KFNB by Bancorp. Moreover, Plaintiff has taken all steps required to preserve his rights as a dissenting shareholder from the plan of consolidation. As such, the "auction" provision of section 215(d), the final step contemplated in the consolidation procedure, is now amenable to analysis and discussion by the Court. Before undertaking this task the Court regretfully notes that neither it, nor any of the parties have been able to locate any case law dealing with or discussing the auction procedure detailed in section 215(d). Therefore, the Court must consider the wording of the section and attempt to interpret its meaning in light of the circumstances existing in this case.

The predecessor statute to 12 U.S.C. §215 was enacted in 1918. In 1959, the provision was amended and reclassified to its present section in Title 12. The operative language of section 215 substantially approximates the language found in the consolidation statute enacted in 1918, a time when few banking holding companies were in existence. However, since 1918 the ownership of banks by holding companies had proliferated to such a point that Congress deemed it to be in the best interests of the public to pass legislation regulating the acquisition of banks by holding companies. This legislation took the form of the Bank Holding Company Act of 1956, 12 U.S.C. §1841, *et seq.* This Act was amended in 1970 to specifically include one-bank holding companies within its purview. The meaning of the language in section 215(d) is abundantly clear when applied to a two-party consolidation between two existing banks, as was the common occurrence at the time the original enactment was passed. However, as Plaintiff has shown, the language of 215(d) leaves much to be desired when applied to the three-party reverse merger/consolidation transactions, as explained *supra.*, so prevalent in today's business world.

The problems with section 215(d), as applied to holding company consolidations, is illustrated by Plaintiff's argument that the holding company in this case, Bancorp, is merely a business corporation chartered under the laws of Texas and cannot, in any way, be considered a "consolidated banking association" as mentioned in the statute. Since 215(d) states that the shares of stock to be sold at the auction are those of the consolidated banking association, Plaintiff contends that 215(d) can only be satisfied by an auction of KFNB stock, since KFNB is the only entity that can be classified as a consolidated banking association. This argument would have some force if not for

the Court's duty to interpret subsection (d) as an integrated whole. Reading section 215(d) in its entirety, the Court notes that the stock to be auctioned off is that the dissenting stockholders would have received had they not dissented. Admittedly, if this transaction was cast as a simple two-party consolidation between existing banks, KFNB stock would be the stock auctioned. However, the reorganization in this cause is a complicated three-party transaction involving KFNB, a phantom or interim state bank and a holding company, Bancorp. Under this three-way exchange and consolidation program, or reverse triangular merger, shareholders of KFNB approving the reorganization plan are to receive Bancorp stock, and in some case a 12% debenture, in exchange for their KFNB stock. Therefore, the stock to be auctioned off to pay dissenting shareholders is Bancorp stock because that is the stock the dissenting shareholders would have been delivered had they not exercised their right to dissent from the plan of consolidation. This conclusion is based, in part, upon the Court's determination that the reorganization plan as adopted by a majority of KFNB's shareholders contemplates a one-step process whereby the consolidation of KFNB and the interim state bank and the acquisition of the surviving entity by Bancorp is blended into one transaction involving only one exchange of stock, and not a two-step process with two separate stock exchanges as contended by Plaintiff. Despite the inexact language found in section 215(d), the Court finds that a sale of Bancorp stock would, in all probability, comply with the spirit of the statute's public auction provision. For this reason, the Court concludes that Plaintiff's likelihood of success on the merits of his claim that section 215(d) requires KFNB and not Bancorp stock to be auctioned does not possess the substantiality required to justify the grant of a preliminary injunction in this case.

A preliminary injunction may not issue unless the movant carries the burden of persuasion as to *all* four prerequisites. *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 114 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980). (Emphasis added). A finding against the Plaintiff on any of the four prerequisites will justify the refusal of preliminary injunctive relief. *Continental Oil Co. v. Crutcher*, 465 F.Supp. 118, 120 (E.D.La.1979). Because Plaintiff has not carried his burden of proof as to the first prerequisite required for the grant of a preliminary injunction, the Court does not find it necessary to discuss prerequisites two through four. Plaintiff's motion for a preliminary injunction will be denied and the temporary restraining order heretofore granted by the Court will be dissolved.

LET AN ORDER ENTER ACCORDINGLY.

SIGNED this 22nd day of November, 1983.

/s/ Signed

UNITED STATES DISTRICT JUDGE